JUN 13 1955

HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 147

MIGNON REINECKE, Transferee,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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COMMISSIONER OF INTERNAL REVENUE,
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To the United States Court of Appeals for the Eighth Circuit.

Petitioner above named, by her attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above entitled case.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix) is reported at 220 F. 2d 406. The findings of fact and opinion of the Tax Court are unreported, but appear in Transcript of Record, pp. 106-122.

JURISDICTION.

This case involves deficiency in income tax and originated in the Tax Court of the United States by the filing of petition for review pursuant to Section 272 (a) (1) of the Internal Revenue Code of 1939 (26 U. S. C. 272). The judgment of the Court of Appeals was entered on March 24, 1955 (Appendix). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

The question presented is whether or not petitioner is liable for taxes owing from one Carl J. Reinecke by reason of having received from him a certain endowment insurance policy.

STATUTE INVOLVED.

Internal Revenue Code of 1939, section 311 (a):

"§ 311. Transferred assets

(a) Method of collection. The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in

case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) Transferees. The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter."

STATEMENT.

The Court below affirmed the holding of the Tax Court of the United States that petitioner was liable for the taxes of said Carl J. Reinecke because of the assignment to her of a certain endowment life insurance policy. The facts were disputed, and accordingly there are two issues:

First: Whether or not as matter of fact, the policy was transferred to petitioner in April, 1948, or for full consideration, for if it was, petitioner was not liable as transferee. The evidence was as follows:

Three interested but unimpeached witnesses testified that the policy was in fact delivered with intent to transfer it in April, 1948 (Tr. pp. 21, 24).

One witness testified that the policy was "in the physical possession of the First National Bank in St. Louis continuously" for a period including April, 1948 (Tr. p. 23).

The policy bears a notation that it was in Hartford, Connecticut, in April, 1948 (Tr. p. 55).

The policy was pledged to First National Bank prior to April, 1948, to secure a loan which was not repaid until after that date (Tr. pp. 65, 103).

The fact, therefore, appears to be, beyond dispute, that the policy was delivered to petitioner in April, 1948, the pledgee having surrendered possession. Whether the policy was ever returned to the possession of the pledgee, with or without the consent of petitioner (who testified it was not) is, as a matter of law, irrelevant (Tr. pp. 21, 29).

Second: Whether or not petitioner is liable "at law or in equity" for the tax, if the policy was not transferred to her until May of 1950, as the Courts below have found, all other facts being undisputed.

The facts upon this issue, conceding all findings below to be correct, and adding only stipulated facts, may be summarized thus:

Many years ago Carl J. Reinecke, transferor, procured a certain endowment life insurance and annuity policy to be written on his life by Phoenix Mutual Life Insurance Co. (Tr. pp. 37-59), authorized to do business in Missouri under sections 377.200 to 377.460 of the Missouri Revised Statutes 1949 (Tr. p. 29), and paid the premiums on the policy. He retained ownership of the policy, naming petitioner as beneficiary, however, until, at the latest, May of 1950.

In January, 1950, as of September, 1949, being heavily indebted, transferor assigned his other assets of value, consisting of certain farm lands and city real estate, to a trustee for the benefit of his creditors (Tr. pp. 93-95). He had, in September, 1949, given security to one of his creditors, in the form of a deed of trust (mortgage) upon this real estate (Tr. pp. 71-89). The trustee sold the property and used the proceeds to pay his creditors, except respondent, who made no claim against the trustee (Tr. p. 97).

The administration of the trust was completed in May, 1950, at which time transferor assigned or confirmed the assignment of said policy to petitioner (Tr. pp. 61-62).

Thereafter, and more than four months after the assignment for the benefit of creditors of transferor (Tr. p. 6), respondent asserted that petitioner was liable for the taxes due from transferor, and "by distraint" (Tr. p. 28) seized the said policy, notwithstanding that there is no legal authority for distraint under the circumstances. He took the cash surrender value of the policy.

The said policy matured as an endowment on March 25, 1952 (Tr. p. 36). At the time of its transfer to petitioner, whether in May, 1950, or in April, 1948, it had not so matured.

REASONS FOR GRANTING THE WRIT.

A. Petitioner relies primarily on the Second issue stated above as the basis for this Court's interest.

Upon that issue, the judgment of the Court below is in conflict with the decision of the Court of Appeals for the Second Circuit in **Rowen v. Commissioner** (1954), 215 F. 2d 641.

The result in this case is irreconcilable with that in **Rowen v. Commissioner** (supra), and the attempted reconciliation by the Court of its decision with that is illusory. The Missouri law is correctly stated by the Court below as follows:

> "From these (the most recent) declarations of the Missouri Supreme Court, we take the situation under the statutes of that State to be that—no matter how much old-line or reserve-plan life insurance an insolvent debtor may be carrying; no matter who the designated beneficiaries thereof may be; no matter

what amount of premiums is being paid thereon; and no matter how large an accumulative surrender value the policies may have—the benefits of whatever nature which can be made to or will become payable thereunder are immune from the reach of any creditors, either of the holder or the beneficiaries, until the obligation of the insurer to make payment of such benefits has ripened, or matured, or become fixed, in accordance with the terms of the policy."

In reaching a contrary conclusion, then, the Court relies upon the very holding in **Judson v. Walker** (1900), 155 Mo. 166, 55 S. W. 1083, which was held to be changed by statute in **Kansas City v. Halvorson**, 352 Mo. 1027, 180 S. W. 2d 710. **Judson v. Walker** (supra) arose prior to the enactment of the pertinent statute applied in the later case. Further, to reach its conclusion, the Court below implicitly held that the material date was that on which Respondent seized the policy and surrendered it—when it had matured—rather than the date of the alleged transfer.

There is no dispute that the endowment policy was not subject to transferor's debts under Missouri law. The contrary has never been urged by Respondent, and the other creditors of transferor conceded that it was not. The Court in conclusion finds liability on a different basis —that the insurance annuity contract had matured. It had not matured at the date of the transfer in 1950, nor on the date when deficiency was asserted against petitioner, nor on the date when she filed her petition, nor on the date when Respondent filed his answer, but only when it was taken "by distraint," that is, illegally. No argument was ever presented to the Court below that the policy was, under Missouri law, subject to the claims of creditors.

Upon this same issue, the Court below refused to consider equitable defenses presented upon stipulated facts

—that Respondent stood by while general creditors, who did not attempt to assert their claims against the policy, were paid, and only after the time had passed within which petitioner could procure a marshalling of assets and at least a contribution from junior creditors who had been given a wrongful preference, asserted that petitioner was liable.

In holding that equitable defenses are not available in a transferee case, the Court below has rendered judgment contrary to the applicable statute.

B. On the first issue: the Court to sustain the findings of fact of the Tax Court, relies on the existence of **some** evidence to sustain the findings, notwithstanding that it is incredible, and that the burden of proof was upon the Respondent [I. R. C., 1939, sec. 1119 (a)]. In this, as matter of law, its decision is contrary to that of the Court of Appeals for the Fifth Circuit in **McGah v. Commissioner,** 210 F. (2d) 769; and to the decision of this Court in **Pennsylvania Railroad Company v. Chamberlain,** 288 U. S. 333; and to section 1141 (a), I. R. C. 1939; and to the decision of the Court of Appeals of the Sixth Circuit in **Wright-Bernet v. Commissioner,** 172 F. (2d) 343; and to the decision of the Court of Appeals of the Seventh Circuit in **Wellington v. Commissioner,** 196 F. (2d) 241.

C. The questions whether or not an insurance policy, and generally what assets, may be seized by the Collector of Internal Revenue in payment of taxes; and whether or not the transfer of assets exempt from execution under state law, or general law, if there be any, gives rise to transferee liability, are important questions of federal law which have not been, but ought to be, decided by this Court. There are conflicting decisions among the Courts of Appeals touching upon the questions. **Shelton v. Gill** (C. C. A. 4), 202 F. (2d) 503; **United States v. Penn Mutual**

Life Ins. Co. (C. C. A. 3), 130 F. (2d) 495; **United States v. Massachusetts Mutual Life Insurance Co.** (C. C. A. 1), 127 F. (2d) 880; **United States v. Burgo et al.** (C. C. A. 3), 175 F. (2d) 196. See also General Counsel's Memorandum 16,092, XV-1 CB 499; 38 U. S. C. A., sec. 816. **Holden v. Stratton**, 198 U. S. 202; **Pearlman v. Commissioner** (C. C. A. 3), 153 F. (2d) 560. This court reserved the question in **Phillips v. Commissioner**, 283 U. S. 589, 602, and has not since considered it.

Respectfully submitted,

HENRY C. LOWENHAUPT,
408 Olive Street,
St. Louis, Missouri,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,049.

Mignon Reinecke, Transferee, Petitioner,

vs.

Commissioner of Internal Revenue, Respondent.

Petition to Review Decision of the Tax Court of the United States.

[March 24, 1955.]

Henry C. Lowenhaupt (William R. MacGreevy and Lowenhaupt, Mattingly, Chasnoff & Stolar with him on the brief, for Petitioner.

Karl Schmeidler, Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General, Ellis N. Slack, Hilbert P. Zarky and Louise Foster, Special Assistants to the Attorney General, on the brief), for Respondent.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Johnsen, Circuit Judge.

Carl J. Reinecke owed income-tax deficiencies for the years 1945, 1946 and 1947, amounting to $10,177.74. In

January, 1948, he married the petitioner here, Mignon Reinecke. Thereafter, he transferred or assigned to her an insurance annuity contract, issued to him by Phoenix Mutual Life Insurance Co., dated March 25, 1937, and having at the time of the assignment or transfer a cash surrender value exceeding the amount of his income-tax deficiencies.

The insurance annuity contract, which provided for an annual premium payment of $1,220.64, had an endowment maturity date in Reinecke's favor of March 25, 1952, entitling him or his assignee to receive at that time, upon surrender of the policy, the sum of $20,480 in cash, or to be paid the amount of $160 a month thereafter during the remainder of Reinecke's life.

Petitioner had been constituted as the insurance beneficiary of the contract ever since March 22, 1946, under designation made by Reinecke, first under her then name of Mignon Estes, and following her marriage as Mignon Reinecke.

After unsuccessful and sufficient efforts to collect the income-tax deficiencies from Reinecke, the Commissioner of Internal Revenue undertook to impose a liability upon Mrs. Reinecke as a transferee, 26 U. S. C. A. Internal Revenue Code, § 311 (a) (1), in relation to the assigned insurance annuity contract. She sought decisional relief from the Tax Court, which upheld the Commissioner's right to collect the amount of Reinecke's deficiencies against her, and she thereupon filed a petition here for review.

The insurance annuity contract had been kept in force until its endowment maturity date was reached, in March, 1952, after which petitioner, under distraint of the Collector, made surrender of it to the Company for payment of its $20,480 endowment value, with the amount of the income-tax deficiencies and interest being taken possession

of by the Collector from the proceeds. This occurred during the pendency of the case in the Tax Court.

Among the findings made by the Tax Court, in holding against petitioner, were that the assignment of the contract to petitioner had occurred "sometime in May or June, 1950"; that Reinecke was at that time insolvent; that the assignment was without consideration; that it was made with the object on Reinecke's part of hindering, delaying and defeating the Government's collection of the income-tax deficiencies involved; and that this also had been its actual effect. On the basis of Reinecke having so made transfer of his cash surrender right in the insurance annuity contract, with its possession of a value sufficient to satisfy his income-tax deficiencies, the Tax Court held that petitioner could be required to respond for the tax liability as the recipient of a legally fraudulent conveyance or transfer.

Petitioner contends that the Tax Court erred in not finding, instead, that transfer of the insurance annuity contract was in fact made to her in April, 1948—three months after the marriage—by a physical delivery of the instrument to her at that time, with the object of vesting title in her, and with the incidents of complete possession and dominion having also been given and thereafter held and exercised by her on the basis of such actual ownership; that the assignment executed in her favor some two years later (which the Tax Court held to be the sole source and extent of her rights) was intended as and represented a formal confirmation or perfection merely of the previous ownership-transfer; that the transfer which had been thus allegedly made in April, 1948, was in performance of a parol antenuptial agreement entered into between her and Reinecke, whereby he had bound himself to transfer title to the contract to her in consideration of her promise to marry him; that the transfer and assignment to her thus had had a valuable and sufficient consideration; that

Reinecke was not shown to have been insolvent at the time of such transfer; and that on these circumstances there could exist no basis on which to claim a fraudulent conveyance or transfer or to impose any liability upon her in relation to her receiving of the property.

Petitioner had offered testimony on the part of herself and her daughter and son-in-law, supportive in its general aspects of the fact of the insurance annuity contract having purportedly been turned over to her by Reinecke, at the time, in the manner, and under the circumstances claimed by her. But other substantial probative elements were produced by the Government, which were incapable of being reconciled with petitioner's version of the factual situation, and which left the Tax Court free, on a sufficient basis, to test, balance, choose and resolve as to what the realities had been.

Thus, the Tax Court could not be said to have been required to accept petitioner's claim as to the contract having been turned over to her in April, 1948, and as to her having had the possession and dominion of the instrument from that time on as owner, against the Government's proof from the records of the First National Bank in St. Louis of the facts that the contract had been assigned by Reinecke to the Bank in 1946 as part of the collateral for a loan made to him; that the loan had not been paid off until May 4, 1950; that the contract appeared upon the Bank's Collateral Register as having been throughout all that time under assignment to and in the possession of the Bank as pledgee; and that on May 4, 1950, at the time the loan was paid off, Reinecke himself had made confirmation of these facts by receipting the Register for the policy, with specific identification of it, as being on that date returned to him.

The Government further showed that, on the very day of the Bank's return of the policy to Reinecke, a purported

but defective assignment of the contract, with notarial certificate of acknowledgment on the part of Reinecke, had been made in favor of petitioner. Another assignment, in due form and with proper acknowledgment, was thereafter executed by Reinecke in petitioner's favor on June 9, 1950. It was these assignments which the Tax Court held had been the first and only legal basis of petitioner's rights in the contract, and which, on the time and circumstances involved in what Reinecke thus did, had made the transfer a vulnerable one in petitioner's hands as against the Government's unsatisfied tax claim, and so legally had given rise to a liability as transferee against her.

On these direct, substantial, probative elements of material conflict with petitioner's testimony, as we have suggested, we would not be entitled to say as a matter of law that the Tax Court was required to find that the fact was that the contract had been transferred to petitioner, by a physical delivery in April, 1948, and with the possession and dominion having from that time on been held by her in confirmation and demonstration of such an ownership-change having occurred. And with the Tax Court being persuaded and finding to the contrary—that the alleged 1948 transfer by delivery, possession and dominion had not been credibly established as having existed—the court further rationally could conclude that the 1950 assignment had in fact constituted the sole source and basis of petitioner's rights in the contract.

Having rejected petitioner's version of the time and manner of ownership change, the Tax Court could, with these non-existent, material elements being relied upon by her as a basis of foundation and correlationship for her alleged rights, also rationally regard the 1950 assignment as not having had any relationship to an antenuptial agreement and not having rested upon any prior considerational promise to assign, in the light of the factors (1) of the remoteness of the date of the assignment to the time

of the marriage; (2) of Reinecke's execution of the assignment only after he had become insolvent; (3) of the immediacy of the execution of the assignment to the efforts which the Government had for some time been making to collect the tax deficiencies against him; (4) of his apparent concern to get the policy assigned and out of his hands on the very day that it was returned to him by the Bank; and (5) of the other conduct which the Tax Court found that he had similarly been engaging in to escape the payment of his income taxes.

In connection with all this, it incidentally also may be noted that Reinecke obviously was not desirous of giving any testimony on any aspect of petitioner's contentions, nor did petitioner attempt to have him make confirmation thereof in any way, for he was merely put upon the stand at the trial, requested to give his name and address, and was then excused, without any other inquiry being undertaken to be made of him.

Following the decision of the Tax Court against her, petitioner filed a motion for rehearing on the ground of newly discovered evidence. The alleged new evidence consisted of an instrument, captioned "Trustee's Receipt for Securities"; representing a purported business form of the First National Bank in St. Louis; having the blank spaces filled in, with the date set out of April 14, 1948, and with a purported recitation therein that Reinecke was being allowed to take out the insurance annuity contract as "Agent" of the Bank, "for the purpose of changing beneficiary arrangement and for that purpose only;" and providing that the Bank was retaining "all its rights as custodian or pledgee of said securities." A signature had ostensibly been placed upon the instrument at one time but had been cancelled or annulled by being covered with heavy lines of mutilation drawn over and through it. There was no competent showing in the motion that the nullified

signature ever had been intended to have any operative effect or that the instrument itself ever had been used or accorded a significance for any purpose.

Petitioner contends that the instrument should be regarded on its face as having had relationship to the change in the name of the beneficiary from Mignon Estes to Mignon Reinecke, made in the annuity contract in April, 1948. But its date was subsequent to that borne by the written request made by Reinecke upon the Insurance Company for the change in petitioner's name as beneficiary, and subsequent also to that reflected by the printed record of the Company's receiving and actual recording at its home office in Hartford, Connecticut, of the change to petitioner's married name. It would not be entitled to be declared that the Tax Court was required to accept this naked, equivocal instrument, with its unexplained, cancelled signature, with its date subsequent to the time that the Company had received and recorded the requested change in beneficiary name, and with its lack of any legal showing that the instrument ever had had operativeness or significance of any nature, as demonstrative, for new trial purposes, that Reinecke had been given possession of the policy in April, 1948, and had turned it over to petitioner in ownership and retained possession at that time. Against any such probative implication being thus impelled, stood the Bank's records and the plain and unimpeached receipt by Reinecke for the Bank's having turned over the possession of the policy to him on May 4, 1950, with the confirmation given to the occurring of such possession in him by his attempt on the very same day to make assignment of the policy to petitioner. In the light of Reinecke's then insolvent condition, and of his previous efforts to frustrate the collection of his taxes, it would not be an irrational inference for the Tax Court to conclude that this coincidence in the date of his obtaining possession of the policy and his executing an assignment of it was not

fortuitous but meaningful in the chain of circumstances involved.

It may be observed also that even petitioner's own testimony had made no express attempt to link the alleged turning over of the policy to her in April, 1948, with the changing of her name as beneficiary from Mignon Estes to Mignon Reinecke. The record is devoid of any direct testimony by her or any one else in respect to how or when this change in her beneficiary name was effected. All that appears is the recording of the change and its date on the part of the insurer. In the absence of any direct explanation in the evidence, we do not think that the Tax Court was required to try to resolve at all the collateral fact of how the change had been effected, for the purpose merely of such incidence, if any, as it might have, in possible corroboration or confirmation, one way or the other, on the ultimate questions involved—by undertaking to speculate on whether the Insurance Co., since merely the name and not the person of the beneficiary was being changed, had perhaps accepted the change and issued an endorsement for attachment to the insurance annuity contract, without having the instrument itself sent in; or whether, if the policy might have been sent in to have the endorsement made, this had perhaps been done by the First National Bank in St. Louis itself as an accommodation to Reinecke, upon his request to be permitted to have the correction or change in name made to appear; or whether the cancelled and nullified trust-receipt form might possibly be accepted as indicating that Reinecke had perhaps been allowed by the Bank to have temporary possession of the policy for this special purpose, as "Agent" for the Bank and subject to the Bank's retention of "all its rights as * * * pledgee."

In any event, even if the Tax Court had undertaken to resolve the collateral question of how the change in petitioner's name as beneficiary had been effected and had accepted the third hypothesis set out above as possibly

having constituted the basis thereof, this could not here legally be said to be capable of probatively tipping the scales in petitioner's favor upon her contention of ownership transfer having occurred, involving the material elements of alleged possession and dominion of the contract by her, when considered against the direct, unassailed, unmotivated, competently-adduced documentary proof of the Bank's existing assignment and of its possession of the contract thereunder, with return of the policy being demonstrated to have been made to Reinecke on May 4, 1950, by his signed acknowledgment and receipt therefor and with rational corroboration being added thereto by his admitted attempt on the same day to effect a formal assignment of the contract to petitioner. We think the Tax Court could properly say, as it did in denying petitioner's motion for rehearing, that the alleged new evidence was not such, even if it had been accompanied by competent foundational and explanatory showing, as could and might produce a change in the decisional result, and so to entitle petitioner to another trial, on the question of whether she in fact became the owner of the contract in 1950 or in 1948.

We hold that there was ample and proper basis for the Tax Court to find that legal transfer or assignment of the contract to petitioner was first made in May or June, 1950; that such transfer was without consideration; that there was, on the testimony adduced and the circumstances shown, "no credible or convincing evidence of any prior promise to assign the annuity contract to petitioner"; that at the time the transfer to petitioner was made Reinecke was insolvent; and that Reinecke's object in making the assignment and the result of what he so did had been to hinder, delay and defraud the Government's collection of his income-tax deficiencies.

Petitioner has made the further contention, however, that, even though the Tax Court's findings as to the facts

of ownership and transfer be thus upheld, there still should be held to be no basis legally for any liability to have existed against her as a transferee, from the assignment to her and receipt of the insurance annuity contract in ownership by her in 1950, because of the affecting provisions of Mo. Rev. St. 1949, § 377.330, V. A. M. S., §377.330.

That section provides: "The money or other benefit, charity, relief or aid to be paid, provided or rendered by any corporation authorized to do business under sections 377.200 to 377.460 [the writing of stipulated-premium-plan or reserve-basis life insurance, having generally a cash surrender value] shall not be liable to attachment or other process, and shall not be seized, taken, appropriated or applied by any legal or equitable process, nor by operation of law, to pay any debt or liability of a policy or certificate holder, or of any beneficiary named in a policy or certificate."

This statute, as we read its language and the expressions of the Missouri courts relating to it, simply creates a protective immunity, from seizure by attachment or appropriation through other legal or equitable process, for whatever benefits may be provided for by such a policy in favor of the holder or the beneficiary thereof, as against the claims of any creditor of either, so long as such benefits constitute merely something **"to be paid"**, or in other words represent only a matter of **unripened** or **unmatured** or **unfixed policy obligation**, under the terms of the contract. Stated differently—its object would appear to be primarily to deprive creditors, as a matter of state policy and interest in preserving life insurance in force in the State, of the power to destroy the existence or effect the cancellation of any "old line" or reserve-plan life insurance policies, through attempts to reach the premiums paid, the cash surrender value thereof, or such other benefits as have been provided for therein, so long as the obli-

gation of the insurer to pay these benefits—whatever their nature may be—has not ripened or matured or become fixed in accordance with the terms of the contract.

Thus, in **Kansas City v. Halvorson**, 352 Mo. 1027, 180 S. W. 2d 710, 711-712, where a judgment creditor was attempting to reach the life insurance policies of an insolvent debtor, H. H. Halvorson, carried by him in the amount of approximately $40,000, with a premium payment being made thereon of over $1500 annually, and having his wife named in all of them as beneficiary, the Missouri Supreme Court, in an en banc opinion, emphasized the significance of the language, "to be paid," in § 377.330, and said: "Applying this section to the facts stated in appellant's petition, it says that any money to be paid by the corporate respondents (the insurance companies) cannot be seized, either legally or equitably, to pay H. H. Halvorson's debts while these policies are in effect; that is, before H. H. Halvorson's death."

The Court further pointed out the necessity, where the wife is the beneficiary, of reading § 377.330 in relationship to § 376.560 of the statute, which provides: "Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit, independently of the creditors, executors and administrators of the husband; provided, however, that in the event of the death or divorcement of the wife before the decease of the husband, he shall have the right to designate another beneficiary, upon written notice to the company * * *. But when the premiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemptions from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors."

On the basis of the two sections being so read in relationship, the Court added this expression in its opinion: "Section (376.560) cannot be an exception to Section (377.330), supra. In the first place, Section (376.560) applies to all kinds of life insurance and that section was originally enacted in the year 1865; while Section (377.330) was first enacted in 1889 and applies only to insurance policies on the stipulated premium plan, where a reserve is established, so it can have a cash surrender value. Section (376.560) may apply to a policy that does not have any reserve. This shows that Section (376.560) contemplates that the death of the policyholder must occur before the creditors can come within its provision. * * * Can it be said that H. H. Halvorson could [while insolvent] have a policy of insurance in which his sister is the beneficiary and she would be protected under Section (377.330), yet his wife would not have that protection because of Section (376.560)? We think not." 180 S. W. 2d, at page 712.

From these (the most recent) declarations of the Missouri Supreme Court, we take the situation under the statutes of that State to be that—no matter how much old-line or reserve-plan life insurance an insolvent debtor may be carrying; no matter who the designated beneficiaries thereof may be; no matter what amount of premiums is being paid thereon; and no matter how large an accumulative surrender value the policies may have—the benefits of whatever nature which can be made to or will become payable thereunder are immune from the reach of any creditors, either of the holder or the beneficiaries, until the obligation of the insurer to make payment of such benefits has ripened, or matured, or become fixed, in accordance with the terms of the policy.

In the ordinary policy situation, generally "the death of the policyholder must occur," as the Court said in the **Halvorson** case, supra, before the door is open to a creditor to

reach out in any way to touch the payment benefits of a life insurance policy or any other pecuniary aspect in relation to it, such as the excess of premiums which have been paid over $500 in any year on any insurance of which the wife constitutes the beneficiary.

As a matter of fact, all that it is in any event possible for a creditor to touch, in relation to such policies in Missouri as the wife constitutes the beneficiary of, where she has so been from the issuance of the policies to the insured's death, is the amount of "premiums * * * paid * * * in excess of five hundred dollars" in any year. § 376.560, supra.

But where the wife does not constitute the original beneficiary and is designated as beneficiary only after the policy has acquired a cash surrender value, the cash surrender value possessed by the policy at the time of such designation will, upon the insured's death, be treated under the Missouri statutes as having been in the nature of and amounting to premium paid for the benefit of the wife in the year that she was designated as beneficiary, and thus its amount will be made subject to the provisions of § 376.560, provided it is shown that the insured then was and had continued to remain insolvent. **Judson v. Walker,** 155 Mo. 166, 55 S. W. 1083.

This practical viewpoint and construction of the statute have been adopted because, as expressed by the Supreme Court of Missouri, the premiums paid in carrying such insurance, up to the time that the wife is made beneficiary, have had no relationship to the protection of the insurable interest possessed by her in her husband's life, and the accumulated cash surrender value derived from such payments, and carried into her beneficiaryship, is therefore entitled to be treated in realistic effect as "if, instead of changing the beneficiaries in the policies (the insured), had surrendered them, and taken their value in cash, and

afterwards applied for new policies * * * on the same plan," as to which "his increased age would have increased the cost, even if nothing else intervened." Id., 55 S. W. at pages 1088 and 1089.

As to any regular premiums paid by a husband while his wife is beneficiary, the question of whether an intent to defraud creditors has existed is utterly immaterial under the Missouri statute. "What he expended in premium to the amount of $500, whatever his intentions, could not affect creditors, since that which the law authorized him to do could not be fraudulent; and the premium in excess of $500 would be liable to plaintiff's claims without regard to his intentions." **Kiely v. Hickcox**, 70 Mo. App. 617, 622-623, quoted with approval in **Kansas City v. Halvorson**, supra, 180 S. W. 2d, at page 611.

As has been suggested above, in the usual policy situation, the insurer's promise or obligation as to the benefits provided by policy will not ordinarily be called into play, so as to mature or cause it to become fixed, until the death of the insured occurs. But this is not always or in all aspects the legal fact. Sometimes the insurer's obligation for benefits will be caused otherwise to mature or become fixed.

Thus, if the insured undertakes, while living, to surrender his policy and calls upon the insurer to pay him its existing cash value, thereby causing the insurance relationship to be terminated, the obligation of the insurer to make payment of that contractual benefit as provided in the policy will legally have become as fully matured and fixed as the insurer's obligation to pay the death benefit under a policy becomes from the death of an insured whose policy has been kept in force.

Or where, as in the present situation, the policy is one of a special nature, with provision for an automatic endowment maturity date, and with the insurance features of the

contract terminating at that time, the obligation of the insurer then to make payment of the endowment value in accordance with the terms of contract will equally have become as matured and fixed as in the case of a ripened death-benefit obligation.

What has been said is, we think, sufficient to demonstrate that there is no merit in petitioner's contention that the Missouri statutes left her without any basis of liability whatsoever, under state law, to the Government for the amount of Reinecke's taxes, in relation to the assignment made to her of the insurance annuity contract. The Contract, as has been pointed out, had at the time of the assignment to her a cash surrender value exceeding the amount of the tax deficiencies. Only two more premium payments remained to be made upon it, until the contract reached its maturity date and its endowment value would become automatically matured or fixed—which premiums, as the Tax Court incidentally found, were as a matter of fact made with funds of Reinecke and not of petitioner. The assignment was without consideration, and Reinecke was, both then and until the contract matured, insolvent. On the basis of these facts, the proceeds of the matured endowment value and obligation, as existing under the contract, clearly were liable under Missouri law for the amount of Reinecke's unpaid tax deficiencies, since to that extent at least there had been an excess of premiums paid by him for petitioner's benefit over those permitted by the statute, even looking at the 1948 or 1950 cash surrender value alone. **Judson v. Walker**, supra, 155 Mo. 166, 55 S. W. 1083.

Petitioner has made the contention that her surrender of the contract to the insurer was prompted only by the distraint engaged in by the Collector in relation to it. That fact is, however, without legal significance in the situation. So far as is in any way presently material, the policy obligation of the insurer for payment of the endowment benefits

had legally become mature or fixed when petitioner made the surrender. We do not understand the Missouri statutes to mean that a policyholder or beneficiary can thwart such rights as creditors otherwise properly may have to obtain satisfaction out of the matured benefits of a policy by a sitting back and refusing to send in a terminated policy in order to escape having the proceeds so used. We regard the expressions of the Missouri Supreme Court in the cases cited as manifestly implying that the absolute immunity from process which is accorded by § 377.330 to unmatured life insurance policies is without application to matured policies—in other words, those where the obligation of the insurer for payment of benefits has legally ripened or become fixed in accordance with the terms of the contract.

Since the decision of the Tax Court in the present situation can properly be affirmed on the basis of the liability existing and enforceable against petitioner under Missouri law, to allow payment of Reinecke's tax deficiencies to be made out of the matured endowment proceeds, there is no need for us to consider the question here of whether a liability as transferee, under 26 U. S. C. A. Internal Revenue Code § 311 (a) (1), is capable of existing beyond the substantive concepts and bounds of state law, with the limitations imposed constituting more than a state procedural barrier.

In Missouri, as we have indicated, the limitations of the statute in respect to the reaching of unmatured life-insurance benefits, would appear to rest upon a state policy of attempting to preserve life insurance in force in the State as a matter of public interest and general welfare. Certainly, it does not rationally impress that what the Legislature of Missouri was concerned about and was trying to prevent was simply the institution of garnishment proceedings or suits against life insurance companies. With-

out the statute, creditors would have had the power to destroy the existence of such insurance, where a policy having a cash surrender value was assigned by an insolvent insured without consideration, for, as said by the Court in **Judson v. Walker**, supra, 55 S. W., at page 1086, "There is no dispute of the general proposition that a voluntary conveyance by an insolvent debtor of his property to or for the benefit of his wife and children is deemed fraudulent as to his creditors, and void, in law; and that an assignment under such conditions of a life insurance policy [absent the statute] would have a life effect is also undisputed." See also generally V. A. M. S., § 428.020.

Whether, for federal income-tax collection purposes, "the existence and extent of a transferee's liability is to be determined by local law" or is entitled to be rested "on general law as declared by federal courts" is a question on which the Courts of Appeals have divided. **Rowen v. Commissioner**, 2 Cir., 215 F. 2d 641, and **Pearlman v. Commissioner**, 3 Cir., 153 F. 2d 560, from which the expressions just quoted are respectively taken, are typical of the opposing views.

We have not had occasion to engage in specific preoccupation with the direct question, although we have previously made the general declaration, in **Botz v. Helvering**, 8 Cir., 134 F. 2d 538, 542, that "Whether a transferee is liable 'at law or in equity' depends upon State Law," and we have also, in **Irvine v. Helvering**, 8 Cir., 99 F. 2d 265, and **United States v. Hutcherson**, 8 Cir., 188 F. 2d 326, made application of state law to the alleged liability which was in those situations being sought to be enforced against a transferee.

It is sufficient for present purposes that the law of Missouri affords a proper basis for the liability which was en-

forced against petitioner out of the benefits of the matured insurance annuity contract. We accordingly stop our consideration there. This also makes it unnecessary to give consideration to the Government's contention that the policy here was in its nature rather an investment contract than an insurance one, and that it ought therefore to be regarded as being outside the operation of the Missouri statutes. It had, however, an insurance aspect, which was to exist until its endowment maturity date was reached; the premium paid was an integrated one for both its investment and insurance features; and the cash surrender value for which it provided was in release and termination of all its obligations. In this situation, it is enough that liability is not capable of being escaped on the basis of petitioner's own contentions, without attempting to reach out and pioneer some undetermined question of state law not passed on by the trial court, as a basis on which to predicate our result.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(Judgment.)

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15049—September Term, 1954.

Thursday, March 24, 1955.

Mignon Reinecke, Transferee, Petitioner, vs. Commissioner of Internal Revenue.	Petition to Review Decision of The Tax Court of the United States.

This cause came on to be heard on the petition to review a decision of The Tax Court of the United States determining that there is a liability on the part of the petitioner as transferee of Carl J. Reinecke for deficiencies in income tax for the years 1945, 1946 and 1947, amounting to $10,177.74, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the decision of the said Tax Court in this matter be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the petition to review in this matter be, and the same is hereby, dismissed.

. . . . .

March 24, 1955.

SUPPLEMENTAL RECORD

Direct Testimony of Mrs. Mignon Reinecke

• • • •

By Mr. Lowenhaupt:

Q. Mrs. Reinecke, it has been stipulated that shortly after May 4, 1950, another change was made in the designation of beneficiary of this policy. I show you as the beneficiary without power and insured to change. Will you explain the circumstances of that change, why it was made?

A. Well, I was in Mr. Derm's office.

Q. Who is Mr. Derm?

A. Mr. George Derm is our former attorney, Mr. Reinecke's attorney, and I think that he was just kidding a little bit, but he said, "Mignon, you know that policy isn't yours, he could change that beneficiary again, you know, he changed it once." And I think he really meant it as a hint. He didn't mean it might happen, but it wasn't impossible. It was probable. It could happen, anyway. I asked Carl then about it and Carl said, "We will change it and give it to you", so I won't have to worry about that.

Q. The policy, then, had already been delivered to you, is that correct?

A. Yes, I had the policy.

Q. You had the policy?

A. But I was only the beneficiary of it then. And he had changed the beneficiary from his former wife to me.

• • • •

Mr. GARRISON: Cross-examination laying a foundation for impeachment.

• • • •

Q. Did you make the statement to Elmer Oltman or any Special Agent in connection with the interview of your as-

sets that you did not have assets in excess of $1,000 in your lock box?

A. No, sir. The man I interviewed about my brother-in-law didn't ask me any personal questions about me. He was only asking me about Mr. Minor.

• • • •

Q. What was the gross amount of assets you ever held in that lock box at the First National?

A. A little less than $3,000 is all I ever had. I think it was twenty-seven eighty or something like that. I had a slip of paper. In fact, my son-in-law knows that, because he took care of my money while I was gone. I had less than $3,000. Now, Mr. Reinecke never did give me any cash money, as I said yesterday.

• • • •

Q. I have only one further question. Were you ever interviewed by a Special Agent in connection with Raymond Minor?

A. The only time I was interviewed was when I went down to this man's office and told him what I did know about Raymond Minor.

Q. Did you tell him then that you only had $680 in your box?

A. I didn't tell him anything about my personal affairs because he didn't ask me anything about myself. I only went as a courtesy to tell him what I did know. I went of my own accord to tell him what I did know.

Q. Did you ever tell any Special Agent that you at most only had $680 in your lock box?

A. I did not.

• • • •

Examination of Mary Lee Lees:

The COURT: I want to ask her a question.

Mrs. Lees, you saw a paper passed from Mr. Reinecke's hands to Mrs. Reinecke's hands?

The WITNESS: Yes, sir.

The COURT: Your mother's hand, is that right?

The WITNESS: Yes, sir.

The COURT: Now, you were asked whether that was an insurance policy?

The WITNESS: Yes.

The COURT: How did you know it was an insurance policy?

The WITNESS: Well, I looked at it and read that it was an insurance policy, and my husband read it all the way through.

The COURT: You read the policy?

The WITNESS: Well, I looked at the first page and saw that it was a twenty-year paid up insurance policy in Mr. Reinecke's name.

The COURT: You did look at it?

The WITNESS: Yes.

* * * *

The COURT: Do you remember what company the policy was in?

The WITNESS: I think it was Massachusetts Mutual, but I am not positive.

The COURT: But you do remember seeing on it that it was a twenty——

The WITNESS: Twenty-year paid.

The COURT: Now, suppose that had been a copy of the policy instead of being the original, would you have known the difference?

The WITNESS: I probably wouldn't have. I am not that familiar with——

The COURT: I have no further questions.

FURTHER REDIRECT EXAMINATION.

By Mr. LOWENHAUPT:

Q. I hand you Exhibit K to the stipulation and ask you if that looks like the policy which you saw?

* * * *

A. Yes, sir.

RECROSS-EXAMINATION.

By Mr. GARRISON:

Q. Did you state that this was the policy, Mrs. Lees?

A. I said it was a policy resembling this.

Q. You mean it resembles it in color?

A. No, it was a twenty-year paid up policy, I remembered this.

Q. It was fully paid up in '48? You read it?

A. No, it read that it was a twenty-year paid up policy.

Q. With the Provident Mutual Life Insurance Company?

A. As I say, I couldn't swear as to what the insurer——

Q. You don't remember what company it was?

A. No.

Q. Then you don't know whether this is the policy or not is that correct?

A. I don't swear to it, no, sir.

* * * *

Direct Examination of Leslie J. Lees.

By Mr. LOWENHAUPT:

Q. I hand you Exhibit K and ask you if you have ever seen the original of that?

A. I would say it is a copy of it, because I remember that I thought that the policy said it paid off $165 per month, but this one says $160.

Q. Do you remember the name of the company on the policy?

A. Yes, it was Phoenix.

Q. Excuse me, would you mind keeping your hand down? It is hard to hear you. Did you see the original of this policy?

A. It was a Phoenix policy, original of this. I don't know, I suppose it is.

Q. Did you see a Phoenix policy when you were at Mrs. Reinecke's house immediately after her return from Reno?

A. Yes, sir.

* * * *

Cross-examination of Leslie J. Lees.

By Mr. GARRISON:

Q. You testified that, I believe, did you not, that the policy which was delivered to Mrs. Reinecke, 62 Broadview, was in your presence, paid $125 instead of $160?

A. No, I said a hundred sixty-five, I thought, instead of one hundred sixty.

Q. Whereas, this policy calls for a payment of $160. Isn't that correct?

A. That is correct.

• • • •

Q. Do you recall whether it was an insurance policy or an annuity?

A. I know it was a $20,000 policy.

Q. You don't know whether it was an insurance policy or an annuity, is that right?

A. I know this much, that supposedly it was a paid-up policy of $20,000.

Q. Fully paid-up in April of '48, is that right?

A. As far as I know, it probably was, but then I said it was not, because I had gone to the insurance company and paid the premium which could be paid at the insurance company.

• • • •

By the Court:

Do you want to change any part of your answer?

The WITNESS: Well, I think I said both things here because I assumed at first, I thought it was a paid-up policy. Then I recollected that I had paid $1200 to the Phoenix Mutual Insurance Company, and remembering that I had made that premium was what caused me to say that I wouldn't be positive that it was paid up.

• • • •

Direct Testimony of Elmer Oltman.

By Mr. GARRISON:

Q. What is your position, Mr. Oltman?

A. I am a Special Agent for the Intelligence Division, Bureau of Internal Revenue.

• • • •

Q. Will you state whether or not you interviewed Mignon Reinecke, or also known as Mary Gordan, on July 22, 1948?

A. I did.

• • • •

Q. I hand you this paper and ask you what it is.

A. This is a copy of an excerpt of statement given under oath by Mrs. Mignon Estes Reinecke on July 22, 1948, beginning at 2:30 p. m. in the office of the Intelligence Unit, before Elmer Oltman, Special Agent, and Mrs. Lois Lindsay, recorder.

• • • •

Q. State whether or not Mrs. Reinecke informed you on that occasion, that is, July 22, 1948, that the funds, whether or not the funds of Carl J. Reinecke and Mrs. Mignon Reinecke had been commingled in the box?

A. That is correct. Mrs. Reinecke stated that there was an amount of between $4,800 and $5,000 in the box, of which $680 were her own funds, and the balance represented monies belonging to Mr. Reinecke.

Q. Will you state whether or not Mrs. Reinecke indicated whether or not the funds had been commingled for any period of time, any prior period of time?

A. She said the funds she was referring to covered a period of approximately two years prior to the date of the interview.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 147

MIGNON REINECKE, TRANSFEREE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 106-120) and its supplemental opinion (R. 121-122) are unreported. The opinion of the Court of Appeals (Pet. 9-26) is reported at 220 F. 2d 406.

JURISDICTION

The judgment of the Court of Appeals was entered March 24, 1955. (Pet. 27). The petition for a writ of certiorari was filed June 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Commissioner can reach the proceeds of an insurance annuity contract transferred by an insolvent husband to his wife without any consideration at a time when taxes were owing, the policy having matured since the transfer.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

(26 U. S. C. 1952 ed. 311.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.311-1 [As amended by T. D. 5458, 1945 Cum. Bull. 45]. *Claims in Cases of Transferred Assets.*—The amount for which a transferee of the property of a taxpayer is liable, at law or in equity, and the amount of the personal liability of a fiduciary under section 3467 of the Revised Statutes, as amended (paragraph 81 of the Appendix to these regulations), in respect of any income tax imposed by Chapter 1, whether shown on the return of the taxpayer or determined as a deficiency in the tax, shall be assessed against such transferee or such fiduciary, as the case may be, and collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by chapter 1, except as hereinafter provided. * * *

The term "transferee" as used in this section includes an heir, legatee, devisee, distributee of an estate of a deceased person, the shareholder of a dissolved corporation, the assignee or donee of an insolvent person, the successor of a corporation, a party to a reorganization as defined in section 112, and all other classes of distributees.

* * * * *

STATEMENT

The pertinent facts as found by the Tax Court are as follows (R. 106-117):

The Commissioner determined deficiencies in income taxes against petitioner's husband, Carl Reinecke, for the years 1945, 1946 and 1947 in the total amount of $10,177.74. This tax liability was admitted by Reinecke on January 25, 1950, and assessment thereof was duly made on March 25, 1950. Repeated demands were made upon him for payment, but only $350 was ever collected from him. (R. 107-108.)

On March 25, 1937, Reinecke had entered into an annuity contract with Phoenix Mutual Life Insurance Company, Hartford, Connecticut. Under this contract he was required to pay 15 annual premiums of $1,220.64 each on March 25 until 1952. All premiums were paid by him when due and the contract remained in full force until quitclaimed and surrendered to Phoenix Mutual on July 2, 1952, for $20,686.84 in full settlement thereof. (R. 107-108.)

During the duration of the annuity contract, Reinecke made numerous changes with respect to the beneficiary. Petitioner was first named as beneficiary on March 22, 1946, under the name "Mrs. Mignon E. Estes, friend", and after she married Reinecke she was redesignated beneficiary on April 15, 1948, under the name of Reinecke. (R. 108-109.)

On September 6, 1946, Reinecke assigned the an-

nuity contract to the First National Bank in St. Louis as collateral security for a loan and from that date until May 4, 1950, when the debt was completely paid, the bank owned "all rights, privileges, and benefits" in the contract except the right to change the beneficiary which was reserved by Reinecke. Upon payment of the debt, the bank released the annuity contract to Reinecke. (R. 109-110.) Immediately upon the release of the contract by the bank, petitioner attempted to obtain all property rights in the contract by a purported assignment, but this was not signed by Reinecke or acknowledged by Phoenix Mutual. (R. 63.) However, on June 9, 1950, Reinecke formally assigned the contract to petitioner. (R. 61.) This contract had a cash surrender value of $18,759.04 on the date of assignment to petitioner which the Tax Court found was not earlier than May 4, 1950, or later than June 9, 1950. (R. 111.)

Liens were filed by the Collector against all property belonging to Reinecke and the latter was notified on May 26, 1950, that warrants for distraint had been given the collection agents. However, such agents were unable to collect and in the meantime Reinecke had divested himself of all of his assets. (R. 108.)

Upon being named assignee, petitioner deposited the original of the contract in her bank lockbox and kept it there until she quitclaimed and surrendered it to Phoenix Mutual on July 2, 1952. (R. 111.)

In a financial statement filed by Reinecke on

June 1, 1950, he declared under oath that he was "wrecked financially" and was then insolvent. (R. 111.) This statement is supported by an itemized statement of his assets and liabilities for May 31, 1950 (R. 112), and by another one filed on September 18, 1950, in connection with an offer in compromise (R. 113-114).

The Tax Court found that Reinecke was insolvent as early as May 1, 1950, and that, in effecting a plan to defeat collection of his income tax, he assigned the annuity contract to petitioner without consideration. Accordingly the Tax Court held that petitioner was liable as a transferee for the deficiencies in income tax determined against Reinecke for the years 1945, 1946 and 1947. (R. 115-117.)

The Court of Appeals affirmed the decision of the Tax Court.

ARGUMENT

1. Petitioner, as donee of an insolvent husband, is a transferee within the meaning of Section 311 of the Internal Revenue Code of 1939 and Section 29.311-1 of Treasury Regulations 111, *supra*, pp. 2-3, and all conditions essential to the imposition of transferee liability on her have been met. The parties stipulated that petitioner's husband owed the income tax deficiencies determined against him for the years 1945, 1946 and 1947 and that all reasonable efforts had been made to collect such taxes before action was commenced against her. (R. 26, 36.) The stipulation also shows (R. 28) that there

was an absolute assignment of the annuity contract by Reinecke to petitioner in 1950, which was long after the accrual of his tax liability. The Tax Court found (R. 111) that this annuity contract had a cash surrender value of $18,759.04 at the time of the assignment to petitioner and that no consideration was given by petitioner for such contract. Furthermore, financial statements filed by Reinecke in 1950 establish that he was insolvent before the assignment of the annuity contract to petitioner. (R. 114-115.)

We submit that these facts meet the requirements for imposition of transferee liability. See 9 Mertens, *Law of Federal Income Taxation,* Section 53.10. In contending otherwise, petitioner questions the factual conclusion of the Tax Court regarding the time when the assignment was made, it being contended that the transfer took place in April, 1948, and that the husband was not shown to have been insolvent at that time. (Pet. 3-4, 7.) However, none of petitioner's objections to the Tax Court's findings are well founded as they are based on the premise that the Tax Court was compelled to accept her own testimony and that of two other interested witnesses as being true. This testimony, moreover, not only contains vague and conflicting statements but is in conflict with other testimony and with documentary proof which was properly acceptable by the Tax Court. All the evidence was carefully reviewed not only by the Tax Court (R. 106-120) but also by the Court of Appeals (Pet. 9-17). The conclusion of the court below that there

was proper basis in the record to warrant the Tax Court's finding that the transfer took place in May or June 1950 is correct and poses no question warranting further review.[1]

Petitioner contends further that, even if the Tax Court's findings are accepted, the policy was beyond the reach of the Commissioner under Missouri law. (Pet. 6.) The court below fully considered the Missouri statutory provisions[2] relating to insurance and held against petitioner even on the assumption that the Missouri statutes were applicable to the particular annuity here involved and that they determined the rights of the Commissioner. In this connection it pointed out (Pet. 18-23) that in Missouri a creditor has a right to recover from a wife on what is owed by the insured to the extent that insurance premiums in any year exceed $500, but that payment will not be allowed until the policy has matured. In the case of a change in the beneficiary or assignee, the cash surrender value at the time of such change may be

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[1] The petitioner asserts that the decision conflicts with an opinion of this Court and cases in various of the courts of appeals with respect to the quantum of proof necessary to meet the government's burden of proof with respect to transferee liability (Pet. 7). But the court below did not rely, as the petitioner assumes, on the existence of "some" evidence; on the contrary, it carefully considered all the evidence and found for the government. There is no conflict with the cases cited.

[2] The applicable statutory provisions relating to insurance are Sections 376.560 and 377.330, 19 Vernon's Annotated Missouri Statutes, and are set out in the opinion of the court below. (Pet. 18-19.)

treated as a premium paid. This interpretation is in accord with *Kansas City* v. *Halvorson,* 352 Mo. 1027, 180 S. W. 2d 710. In applying these provisions of Missouri law, the court below held that since the cash surrender value at the time of the assignment in 1950 was in excess of the $500 statutory limitation for premiums and also in excess of the accrued tax liability, and as the contract had matured in 1952, petitioner was liable as a transferee and could be required to pay such taxes. The interpretation of Missouri law by the Court of Appeals does not present any questions meriting review by this Court.

2. The decision of the court below does not conflict with *Rowen* v. *Commissioner,* 215 F. 2d 641 (C. A. 2d). (Pet. 5.) There, although it was held that a decedent's wife and children, who were the named beneficiaries in his life insurance policies, were transferees as to the cash surrender value of the policies, it was also decided that they were not liable for the decedent's unpaid income taxes under a New York statute providing that, in the absence of fraud, creditors of an insured person cannot recover any part of his insurance proceeds. Thus the Second Circuit determined the question of transferee liability by applying local law. But that is also what the court below did here for it affirmed the Tax Court "on the basis of the liability existing and enforceable against petitioner under Missouri law" and did not reach the question whether, if local law had created an exemption, it could be applied to limit the federal transferee liability.

(Pet. 24.) The conclusion reached by the court below that there was no exemption is of course different from that reached in the *Rowen* case since the Missouri statute gives creditors a right of recovery which is denied by the New York statute. The same explanation is applicable to *United States* v. *Truax* (C. A. 5th), which was decided June 2, 1955 (1955 C. C. H., par. 9486), and which denied transferee liability because of a Georgia insurance statute very similar to the New York statute.[3]

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[3] Other cases cited by petitioner (Pet. 7-8) as conflicting decisions are also distinguishable. In *Shelton* v. *Gill*, 202 F. 2d 503 (C.A. 4th), the collection of taxes asserted against the alleged transferees was enjoined because such persons had actually not received any property as transferees within the meaning of the revenue statute. *United States* v. *Penn Mut. Life Ins. Co.*, 130 F. 2d 495 (C.A. 3d), and *United States* v. *Massachusetts Mut. Life Ins. Co.*, 127 F. 2d 880 (C.A. 1st), were suits brought under 1939 Code Section 3710 and decided that the insurance companies which had issued policies to the delinquent taxpayers involved there were not liable for failure to pay over the cash surrender value of such policies to the Government after it was unable to collect from the taxpayers. In *United States* v. *Burgo*, 175 F. 2d 196 (C.A. 3d), it was decided that the Government's tax lien did not attach to certain insurance policies because such policies belonged to the taxpayer's wife who acquired a vested interest therein under New Jersey law at the time of their issuance. In *Holden* v. *Stratton*, 198 U. S. 202, it was held that the trustee in bankruptcy was not entitled to the insurance policies of the bankrupt in view of the Washington statute exempting such policies from payment for debts and also in view of a provision in the Bankruptcy Act excluding exempt property from the assets to be administered by the trustee. And in *Phillips* v. *Commissioner*, 283 U. S. 589, this Court held that summary procedure prescribed for the collection of taxes from a transferee is not unconstitutional but stated that it had had

CONCLUSION

The decision of the court below is correct. There is no conflict in decisions and no other reason exists warranting further review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1955.

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no occasion to decide whether the right of the United States to follow transferred assets is limited by any state law.

Petitioner also cites *Pearlman* v. *Commissioner*, 153 F. 2d 560 (C.A. 3d), but the decision there is in accord with that of the court below, as the widow who was a beneficiary under the insurance policies involved was held to be a transferee liable for income tax owed by her deceased husband. Moreover, while the court there stated that the issue was one to be answered without reference to state law limitations, it also explained that it had examined the Pennsylvania decisions and had concluded that whether reliance was placed on general law, as declared by federal courts, or on Pennsylvania law, transferee liability should be imposed there.

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